United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief for Appellant

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia

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Docket No. 20,888
Criminal No. 189-58

John L. Worthy, Appellant

vs.

United States of America, Appellee

Appeal from the United States District Court
For the District of Columbia

Thomas M. Raysor,
Attorney appointed to represent
Appellant in this case.

John B. Olverson
Co-Counsel appointed to represent
Appellant in this case.

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STATEMENT OF QUESTIONS PRESENTED.

1. Were appellant's Constitutional rights under the Fourth, Fifth and Six Amendments of the Constitution violated by police officers through illegal search and seizure in a situation where a baseless, warrantless, vagrancy arrest without probable cause, later nolle prossed, was used as a vehicle to secure narcotics evidence, otherwise unobtainable which resulted in conviction on narcotics charges?

2. Is the Vagrancy Statute, Title 22-3302 D. C. Code (1967 Ed.) under which appellant was originally charged unconstitutional because of vagueness, uncertainty and indefiniteness?

3. Is it reversible error for the District Court to refuse to give appellant, in advance of trial and on his request, copy of the transcript of the sworn testimony of a police officer given in open Court on hearing of Motion to Suppress Evidence, so that appellant could properly prepare for defense cross-examination at trial?

4. Was it reversible error for the Court to refuse to grant appellant's two pro se motions prior to trial for termination of services of his Court-appointed counsel where appellant alleged as grounds lack of communication and other reasons?

5. Was appellant denied a speedy trial guaranteed under the Sixth Amendment of the Constitution when elapsed time from indict-

ment to trial was more than eleven months, namely, from February 18, 1966 to January 24, 1967 respectively?

6. Was appellant deprived of his Constitutional rights to a fair trial under the Fifth and Sixth Amendments of the Constitution through ineffective assistance of counsel?

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

Docket No. 20,888
Criminal No. 189-56

John L. Worthy, Appellant

vs.

United States of America, Appellee

Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

Case No. 20,888 is a direct appeal under Title 28 U. S. Code 1291 without prepayment of costs. Thomas M. Raysor, Esq., and John B. Olverson, Esq., were appointed as Co- Counsel to represent appellant, John L. Worthy.

Appeal is taken from judgment, sentence, and commitment in District Court Criminal No. 189-66 wherein appellant, John L. Worthy, was sentenced, on March 23, 1967, ten (10) years on Count I possession of narcotics, and ten (10) years on Count II facilitation of concealment and sale of narcotic drugs, both sentences to run concurrently, Title 26 U. S. Code Section 4704 (a) and Title 21 U. S. Code Section 174.

STATEMENT OF THE CASE

Appellant testified at his District Court trial on January 24, 1967 on narcotic charges under Title 26 U. S. Code 4704 (a) that: on October 21, 1965 about 1:30 a.m. he came out of a rooming house at 1226 - 7th Street, N.W., where he had been visiting a friend to go to a nearby restaurant; that he noticed a lights-out, black, unmarked car with two men in plain clothes sitting in it; that as he started past the car one of the men called him over to the car; that one of the men was a colored man and the other a white man; and that the following transpired:

"Q Had you seen these men before?

A Never. So, I walked over to the car and stooped down and asked what was wrong, you know, I know Officer Jenkins, the colored one, and he asked me questions, such as my name, where I live, where I work at, what I was doing around there, and had I used any narcotics, how much narcotics had I used. I told him 'none.' So, he opens the car door and gets out of the car, comes around and tells me to stand up and put my hands on top of the car, and then he went in my pocket and took the thing with the narcotics out." (Trial Tr 46)

Detective Willard S. Kuntz, Jr. testified (Trial Tr 4) that he was operating in plain-clothes working with Detective Ronald P. Jenkins from midnight to 8:00 a.m. October 21, 1965 in an unmarked cruiser; that at approximately 1:50 a.m. to 2:18 a.m., (the time of arrest) that they were in the general area of 1238 - 7th Street, N.W. in the District of Columbia; that they saw appellant three times on that date at approximately midnight and when appellant was placed under arrest by Detective Kuntz for vagrancy at 2:18 a.m. (Trial Tr 13); that after the arrest Detective Kuntz searched appellant and found in his right-hand pocket 53 capsules which were subsequently ascertained to be heroin.

Detective Jenkins corroborated that Detective Kuntz placed appellant under arrest for vagrancy and searched him; that such arrest and search were without a warrant; that he was present at the time; (Trial Tr 32) that appellant was sober.

Appellant was then taken to the Second Precinct and booked on charges of vagrancy; and possession and facilitation of concealment and sale of narcotics.

On October 21, 1965, Information was filed against John L. Worthy in the District of Columbia Court of General Sessions Criminal Division, charging him with being a vagrant as per photocopy of Information attached hereto as Appendix I being U. S. No.

D. C. 32783-65. The Information shows on the back that the case was on December 2, 1965 continued to January 6, 1966 at the request of defendant to have counsel present; that appellant was committed to Saint Elizabeths Hospital for observation in U. S. - 9374-65; that on February 11, 1966 the case was continued to February 18, 1966; that on February 18, 1966 the case was Nolle Prossed in open Court.

On October 21, 1966 Complaint was filed charging appellant with unlawful possession of narcotic drugs, to wit, heroin, not being in the original stamped package in violation of Title 26 U. S. Code Section 4704 (a) (Appendix 2). On February 18, 1966 presentment and indictment was filed in two Counts, namely, (1) possession and (2) facilitation of concealment and sale of narcotic drugs under Title 26 U. S. Code 4704 (a). Subsequently on March 11, 1966, appellant pleaded not guilty and attorney was appointed by the District Court to represent him.

On April 29, 1966 appellant's Motion to Suppress Evidence came on for hearing before District Court Judge John J. Sircia. On that occasion appellant testified that he had been to a restaurant at the corner of 7th and N Streets, N.W., and gotten a cup of coffee; that when he came out he went to 1226 - 7th Street, N.W.; that he came out again on his way back to the store when he saw two plain-

clothes men sitting in an unmarked car; that he didn't know them to be Officers at the time; and that the following transpired:

"Q Unmarked car?

A Yes, and one of them called me over to the car so I went over and stooped down so I could see in and the officer that was driving, he asked me, he said, 'What are you doing around here? I have seen you twice tonight already.' I said, 'I have been to the store and I am going back to the store.' So he asked me 'what is your name and I said John Worthy.' So he asked me, 'What have you been arrested for before?' I said, 'Grand larceny and petit larceny.' He said, 'How much stuff do you use?' I said, 'Stuff?' He said 'narcotics'. I said I don't use narcotics.' The officer driving comes around the car and told me to stand up and put my hands on top of the car, that I did, and he searched me and took the narcotics out of my pocket and put me in the back of the car.

Q When he told you to put your hands on top of the car, you feel you were under arrest at that time?

A After he told me to do that I felt I were.

Q Did they have a search warrant?

A No, they didn't have any warrant for my arrest.

Q What did they arrest you for?

A When we got to the precinct they charged me with vagrancy and possession." (Suppress Tr 5-6)

Officer Jenkins did not testify at the Motion to Suppress Evidence. Officer Kuntz testified for the Government at the Motion to Suppress Evidence, that he observed appellant in front of 1237-7th Street, N.W. with a Miss Lindsay "that we approached and I questioned the defendant, Worthy, and asked him his name and date of birth and where he lived, his occupation, which he stated he had none" (Suppress Tr 11-12). He also answered certain other questions. He also asked him why he was out at this time of the night and Worthy stated "He was just out. At that time I informed him that he was under arrest for vagrancy"; that he searched him for a weapon; that "in his righthand coat pocket I found a prescription type bottle containing 53 capsules" (Suppress Tr 12). These capsules were later found to contain heroin.

On cross-examination in response to questions asked, Detective Kuntz testified that he had seen appellant before and had seen his picture in the Identification Bureau which showed on the back that he had been convicted of larceny and forgery from United States mail, also petit larceny and also narcotic-vagrancy charge. (Suppress Tr 4).

On cross-examination the following also transpired:

"Q What probable cause did you have to serach Mr. Worthy?

A Because he was a male and the other two are females, sir.

Q Did you yourself search Mr. Worthy?

A Yes, sir, I did.

Q And how did you do this, how did you search him? Did you arrest him first?

A Yes, sir, I advised him he was under arrest for vagrancy and proceeded to search him." (Suppress Tr 15)

After the hearing the Motion to Suppress was denied by the Court.

Later appellant pro se filed a Motion to Vacate Appointment of Court-Appointed Counsel and the matter came on for hearing in open Court on June 10, 1966 wherein the following transpired:

"The Court: This is one of those self-serving pro se Motions, Mr. Micheel? I am going to deny it."

"Mr. Micheel: Thank you Your Honor."

Appellant pro se again filed a Motion to Vacate the Appointment of Court-Appointed Counsel which came on for hearing in open Court on August 12, 1966. At this hearing appellant in general advanced the

following contentions (August 12, 1966 Tr 4 et seq.): that appellant talked with Court-appointed counsel on the day that he was appointed; that on December 2, 1965 he appeared in the Court of General Sessions on the vagrancy charge, but counsel did not appear on his behalf, so it was continued; that on December 8th, 1965, he was interviewed by his counsel in the cellblock of the District Courthouse, and he asked him if he would file a motion for mental examination; that on Friday, December 10, 1965, he appeared in District Court for what he thought was a hearing on the motion for mental examination, but his counsel did not appear and another counsel, Mr. Rex Nelson, volunteered to argue this motion which at the time they both thought was a motion for mental examination; that it turned out to be a motion for reduction of bond, but the Court held in abeyance the motion for reduction of bond and granted his oral motion to be sent to Saint Elizabeths Hospital; that he came back to the District Jail from Saint Elizabeths Hospital on February 18, 1966; that from this time until August 12, 1966, appellant alleges he had no contact with his counsel until trial; that he wrote counsel but received no response to his letters; that he appeared in the Court of General Sessions, but the charge of vagrancy was Nolle Prossed; that on February 23, 1966 appellant was indicted on the narcotics charges which "stemmed"

from the original charge of vagrancy which was Nolle Prossed (Tr 5); that appellant requested his counsel to file a Motion for Suppression of Evidence which he did file and also argued, "But he would not subpoena the arresting officer. Another officer who was not the arresting officer, testified that he was the arresting officer. When I brought it to his attention he told me that Judge Sirica did not want but one witness at that time; and the motion was denied" (Tr 5-6); that on May 10, 1966, he talked with counsel and asked him if he would file any other motions and prepare a defense for the charge of possession and was told there was nothing to file and it has been like this since May 10th; that appellant had been scheduled for trial five times now and each time it had been continued; that only once did appellant talk with Mr. Micheel in the cellblock; that appellant felt that his counsel's representation "is not up to par with the American Bar Association's professional ethics" and he asked the Court that his appointment be terminated because he has not exercised any efforts in my behalf;" that counsel had not communicated with him with respect to the charge and the circumstances; that he asked him to subpoena a statement of facts which the arresting officer typed with respect to his motion to suppress; that he told me he would but he never got it; that counsel told him he would have to

pay for it; that the statement of facts would have a lot of bearing and proved the officer who testified was not the arresting officer; that Officer Jenkins was the arresting officer; that appellant had copies of five motions he had filed on these charges but the Clerk of the Court sent them back to me because he had counsel of record; that having counsel "who is not putting forth any effort is the same as not having a counsel at all"; that he was going to trial without any proper defense and without knowing of steps taken by counsel because "he has not consulted me with reference to my charge."

The Court pointed out that motion for mental examination had been filed and granted; that with respect to a Motion to Suppress Evidence all any counsel can do is present evidence and argue the matter; that no counsel can guarantee that a Motion to Suppress Evidence will be granted; that as far as the arrest was concerned, an arrest can be made by any officer regardless of whether he personally is the officer acquainted with the facts; that counsel had to familiarize himself with the case and make an investigation; that August is a very difficult time because people are absent from the city on vacations; that the case had been continued a number of times, but it is not possible that every case can be reached the first time it is set; that jail cases are given priority; that most of the cases have been continued because of the absence of witnesses on vacation at this time of the year; that Court-

appointed counsel did not seek the appointment; that he was appointed by the Court because the Court felt it necessary under the law for defendant to be represented on serious criminal charges; that the appellant then testified (Criminal Tr 9) that counsel had nothing in his file; that he was "trying to get rid of him" because he would probably not do anything; that "there is no agreement we can come to. Surely I have got to be found guilty with that kind of representation, Your Honor. There has not been any agreement of any kind and we have not conferred and conversed with each other. He does not accept anything I tell him about the case." The Court then asked counsel whether he could effectively represent the defendant and he said that he felt that he could effectively represent the defendant if he could get some cooperation from him pointing out that he had had difficulty in communicating with appellant; that the latter had his own ideas and he was doing his best to represent him under most trying circumstances. The Court told defendant that he would have to have counsel to represent him; that if he felt that there was any real disinclination on the part of Court-appointed counsel to represent defendant actively and properly, the Court would have removed counsel but the Court felt that counsel was performing a professional duty and obligation under difficulties; that appellant was under a responsibility

to furnish counsel with all the necessary facts and cooperate; that if he removed counsel at a time when the case was set for trial within a month that the result would be that appellant's case would be further delayed. The Court thereupon denied the motion to terminate the appointment of counsel.

Appellant also contends that in advance of trial he requested a copy of the transcript of the hearing on the Motion to Suppress Evidence to be used by him and his counsel in preparation for defense cross-examination at trial, but his was denied by the Court.

Following jury verdict of guilty, judgment, sentence and committment was entered in District Court Criminal No. 187-66 wherein appellant was sentenced on March 23, 1967 to ten (10) years on Count I, possession of narcotics, and to ten (10) years on Count II, facilitation of concealment and sale of narcotic drugs, both sentences to run concurrently.

Timely appeal therefrom was taken to this Court and present counsel were appointed by this Court to represent appellant on this appeal.

CONSTITUTION, STATUTES, AND RULES INVOLVED

Constitution of the United States

Amendment IV -- Searches and Seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V -- Capital Crimes; Due Process. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time ofWar or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI -- Jury Trial for Crimes, and Procedural Rights. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

D. C. CODE(1967 ed)

§ 22-3302. "Vagrants" defined.

The following classes of persons shall be deemed vagrants in the District of Columbia:

(1) Any person known to be a pickpocket, thief, burglar [sic], confidence operator, or felon, either by his own confession or by his having been convicted in the District of Columbia, or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any park, highway, public building, or at any public gathering or assembly.

(2) Repealed.

(3) Any person leading an immoral or profigate [sic] life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source.

(4) Any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame, or who (whether married or single) engages in or commits acts of fornication or perversion for hire.

(5) Any person who frequents or loafs, loiters, or idles in or around or is the occupant of or is employed in any gambling establishment or establishment where intoxicating liquor is sold without a license.

(6) Any person wandering abroad and lodging in any grocery or provision establishment, vacant house, or other vacant building, outhouse, market place, shed, barn, garage, gasoline station, parking lot or in the open air, and not giving a good account of himself.

(7) Any person wandering abroad and begging, or who goes about from door to door or places himself in or on any highway, passage, or other public place to beg or receive alms.

(8) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

(9) And all persons who by the common law are vagrants, whether embraced in any of the foregoing classifications or not.

STATEMENT OF POINTS

I. The District Court erred in refusing to grant Appellant's Motion to Suppress Evidence obtained through illegal search and seizure by police officers acting without a warrant and without probable cause which resulted in violation of Appellant's Constitutional rights under the Fourth, Fifth and Sixth Amendment of the Constitution.

II. The Vagrancy Statute Title 22-3302 D. C. Code (1967 Ed.) under which appellant was originally charged is unconstitutional because of vaguness, uncertainty and indefiniteness.

III. It is reversible error for the District Court to refuse to give appellant in advance of trial and on his request copy of the sworn testimony of a police officer given in open Court on Motion to Suppress Evidence so that appellant could properly prepare for cross-examination at trial.

IV. It is reversible error for the District Court to refuse to grant appellant's two pro se Motions prior to trial for termination of services of his Court appointed counsel where appellant alleged as grounds lack of communication and other reasons.

V. Appellant was denied a speedy trial guaranteed under the Sixth Amendment of the Constitution when elapsed time from

indictment to trial was more than eleven months, namely, February 18, 1966 to January 24, 1967.

VI. Appellant was deprived of his Constitutional rights to a fair trial under the Fifth and Sixth Amendments of the Constitution through ineffective assistance of counsel.

SUMMARY OF ARGUMENT

I. The District Court erred in refusing to grant Appellant's Motion to Suppress Evidence obtained through illegal search and seizure by police officers acting without a warrant and without probable cause which resulted in violation of Appellant's Constitutional rights under the Fourth, Fifth and Sixth Amendment of the Constitution.

It is the "time-honored police method . . . to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime", said Mr. Justice Douglas in Carignan v. United States, 342 U.S. 36, 46 (1951). The facts in this case sharply demonstrate police misconduct used to evade the mandates of the Fourth and Fifth Amendments of the Constitution as follows: (1) The right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause particularly describing the place to be searched (Amendment IV); and (2) No persons shall be deprived of liberty without due process of law (Amendment V.)

There was no warrant. The appellant was peaceful and sober when he came out of a rooming house at 1226 Seventh Street N.W. at 1:30 a.m. on October 21, 1965, where he had been visiting a

friend. He planned to go to a restaurant nearby when he noticed a lights-out black car with two plainclothesmen sitting in it. As he started past the car, one of the men called him over to the car and started asking him some questions. No crime was committed even under the Vagrancy Statute which is broad, uncertain and indefinite. In response to being called over to the car, appellant stooped down and asked what was wrong. At this point, one of the plainclothesmen started to ask him "questions, such as my name, where I lived, where I work at, what I was doing around there, and had I used any narcotics, how much narcotics had I used", and so forth. Appellant states that he told them "none" as to the inquiry about the narcotics. Appellant was asked why he was out at that time of the night and Worthy stated that he was "just out". He was then told he was under arrest for vagrancy. One of the plainclothesmen opened the door, came around and told appellant "to stand up and put my hands on top of the car". He then went into appellant's righthand coat pocket and secured 53 capsules of narcotics. On cross-examination, Detective Kuntz was asked what probable cause he had to search appellant and he responded "because he was a male and the other two were females, sir." He said he arrested him first and then searched him.

It thus appears that there was a baseless charge of vagrancy

which was apparently used as a vehicle for the search and seizure for narcotics. There was no probable cause to arrest appellant for vagrancy. Thompson v. Louisville, 362 U.S. 199 (1960). Undoubtedly the police officers had in mind searching Worthy for narcotics and simply said he was under arrest for vagrancy in order to have a reason for searching him. Appellant was arrested on "mere suspicion". Wong Sun v. United States, 371 U.S. 471 (1963). The valid interest of the police could have been satisfied by alternative and Constitutional means.

Because the search of appellant was incidental to an unlawful arrest, it was itself unlawful. United States v. diRe, 332 U.S. 581 (1948). To permit this type of misconduct on the part of the police is not only unlawful but it encourages police lawlessness and permits a device or "gimmick" which can be used to try to secure narcotics evidence without going to the trouble of securing a warrant.

Justice Jackson in United States v. diRe, supra, at page 595, emphasized this danger when he said, "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officers' knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law

it is good or bad when it starts and it does not change character from its success."

Further, in rebuttal of the argument to demand the police to stringently observe the letter and meaning of the Constitution and particularly the Fourth Amendment would make law enforcement more difficult and uncertain, Justice Jackson stated in United States v. diRe, supra, as follows: "The forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free man than the escape of some criminals from punishment."

It is fundamental law that in the absence of a warrant, a search is illegal unless shown to be incidental to a valid arrest. The validity of the arrest in turn depends upon whether there was probable cause to believe that an offense had been or was then being committed. In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court pointed out that there is a need for closer and more stringent examination of a warrantless arrest as opposed to one based upon a warrant. It is also well established that the probable cause for an arrest without a warrant must be as great or greater than that required to be shown as a basis for obtaining a warrant. Any other

rule would destroy the incentive for obtaining warrants. Beck v. Ohio, 379 U.S. 39 (1964).

It is well established that to support the issuance of a warrant, the information must be reliable and there must be a sufficient basis for a finding of probable cause. See Aguilar v. Texas, 378 U.S. 108 (1964).

In Johnson v. District of Columbia (D.C. Appeal No. 4254, June 13, 1967), the lower Court was reversed sua sponte on appeal because of lack of sufficient evidence. In that case, the appellant was arrested for vagrancy. He had been previously convicted of vagrancy, petit larceny and solicitation, all of which was known to the officers and to which offenses he had admitted, the arresting officers had observed appellant loitering at a late and unusual hour of the night in a public area, but all of this was held insufficient without further evidence.

There are numerous other cases supporting appellant's position. In Kelley v. United States, 111 U.S. App. D.C. 396 (1961), defendant was convicted following a Motion to Suppress. The issue on appeal was the admission into evidence of contraband taken from the person under circumstances in which police officers entered a place of business and told defendant to come outside. The search

was not based on a valid arrest or probable cause despite the fact that the search disclosed narcotics used to convict him. The Court held that the evidence was not seized as an incident to a lawful arrest and should have been suppressed. To the same effect is Williams v. United States, 99 U.S. App. D.C. 161 (1956).

The inherent dangers in search and seizure cases generally arise where through hindsight any illegal arrest loses its importance and meaning where the fruits of any subsequent search discloses evidence of a criminal act.

In Pigg v. United States, 337 F. 2d. 302 (1964), appellant's Motion to Suppress was granted upon appeal. The Court felt that the arresting officers in that case lacked probable cause. The probable cause in that case which was advanced to support arrest and seizure included such factors as a late hour of night in a high crime area, the appellant's reputation and a statement by the appellant prior to his arrest from which the arresting officers inferred that the appellant had in fact committed a felony. The Court stated that these factors were insufficient to support an arrest.

It is also fundamentally established that an arrest made upon mere observations cannot be supported. In United States v. Margeson, 259 F. Supp. 256 (1966), the Court held that any arrest based solely

on observations from which the officers inferred the commission of a crime is invalid. This is not probable cause even though, as the Court pointed out, the arrest was based upon good faith on the part of arresting officers. The Court reaffirms the basic principle that any evidence obtained as an incident to an illegal search cannot be admissible as evidence. Aside from the questioning of the appellant and the answers which he gave at the time of his arrest in violation of his Fifth Amendment right to remain silent the police officers in this case were proceeding on the basis of observations.

Now is there any support for the claim that a valid arrest can be supported on the basis of mere suspicion. In Stephens v. United States, 106 U.S. App. D.C. 249, this Court held that probable cause embraces more than mere suspicion. Rather, the Court said probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient inthemselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. In other words, there must be more than a hunch or mere suspicion.

The usual question in a "probable cause" case is whether the officer from his observations is justified in believing that the defendant has committed a crime. Here there was no such justification.

One of the officers merely called appellant over to the car and asked him some questions to which he responded in a normal and reasonable way. Thereupon the officer stated that he was under arrest for vagrancy whereupon he commenced to search him. There is no justification or probable cause to say that he arrested him for vagrancy "because he was a male and the other two were females". (See Statement of the Case.)

There is a need for "exceptional circumstances" to support a seizure without a warrant. Lee v. United States, 98 U.S. App. D.C. 97 (1956). These principles are also enunciated in other cases. See Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480; Nathanson v. United States, 290 U.S. 41 (1933); United States v. Lefkowitz, 285 U.S. 452; and Jones v. United States, 362 U.S. 257.

Because of the vagueness of the Vagrancy Statute (Title 22-3302 D. C. Code), such Statute should and must be construed narrowly in favor of the accused. Harris v. United States, 102 U.S. App. D.C. 202 (1958). In such an instance, rules of probable cause should be more strictly applied to evade an unwarranted invasion of a person's security against unlawful search and seizure guaranteed by the Fourth Amendment of the Constitution.

In this case it should be borne in mind that there was no subsequent trial on the alleged vagrancy charge but the same was ultimately nolle prossed, evidently because there was an insufficient basis to go to trial with any reasonable chance of conviction. The police had obtained the bigger prize which they had sought in the first instance, namely, the narcotics evidence and the spurious charge of vagrancy was thereupon dropped.

The whole issue of arresting a man on one charge and using his detention to search him and secure evidence for a wholly different crime is now under consideration in a case which has been argued before the Supreme Court of the United States, October Term 1967, No. 13 Stephen R. Wainwright, Petitioner v. City of New Orleans, Respondent. No decision has as yet been rendered in that case, but in many ways this case is similar to the case at bar. There the police officers had the barest suspicion, based upon a composite picture in their possession, that petitioner resembled a man involved in some ambiguous way in a murder. Dissatisfied with petitioner's reasonable and truthful answers to questions put by them which in fact established his identity, the police arrested petitioner on a wholly unrelated and spurious charge of vagrancy by loitering in order to allow them to pursue the murder investi-

gation in the privacy of the police station. It will be interesting to read the decision of the Supreme Court in this case.

The issue and this general subject has been considered in a number of studies, namely, Secret Detention by the Chicago Police, A Report by the American Civil Liberties Union (1959); Report and Recommendations of the (District of Columbia) Commissioner's Committee on Police Arrests for Investigation (1962). See Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L. J. 1 (1960).

There is some resemblance in this case to three "stop and frisk" cases before the Supreme Court this Term, namely, People v. Sibron, No. 63; People v. Peters, No. 74; Terry v. Ohio, No. 67.

The whole problem here is the use at trial of evidence seized in the course of a warrantless, non-consensual, non-probable cause street detention, interrogation and search which produced narcotics evidence. The Report of the President's Commission on Crime in the District of Columbia (1966) at pages 569, 570, states as follows:

> "The Narcotics Vagrancy Act poses special prosecutive problems. Its constitutionality is presently being challenged inter alia on the ground that under the Supreme Court's decision in Robinson v. California (370 U.S. 660 [1962]; Cf. Castle v. United States, 347 F. 2d. 492 (D.C. Cir.), cert. denied, 381 U.S. 929 [1965]. See also Easter v. District of Columbia, 361 F. 2d. 50 [D.C. Cir. 1966]) an addict may not be punished for addiction alone.

Although adhering to prior appellate decisions sustaining its constitutionality, a recent Court of General Sessions opinion expressed serious doubts about the law's validity (see opinion of Greene, J., in United States v. Ricks, United States v. Williams, and District of Columbia v. Ricks, Crim. Nos. U.S. 2208, U.S. 2209, D. C. 3050, D.C. Ct. of Gen. Sess. [1966]. These cases are presently on appeal, supra note 53. But see cases upholding the general vagrancy statutes of the District of Columbia: Hicks v. District of Columbia, 197 A. 2d. 154 [D.C. Ct. App. 1964], writ of cert. dismissed, 383 U.S. 252 [1966]; Harris v. District of Columbia, 192 A. 2d. 814 [Mun. App. D.C. 1963]; District of Columbia v. Hunt, 163 F. 2d. 833 [D.C. Cir. 1947]. For general discussion of the problems raised by such statutes, see Lacey, 'Vagrancy and Other Crimes of Personal Conditions,' 66 Harv. L. Rev. 1203 1953; Foote, 'Vagrancy-type Law and Its Administration,' 104 U. Pa. L. Rev. 603 [1056].). Its enforcement also raises troublesome questions. During a recent trial, the police testified that the statute is used to discourage 'junkies' from 'loitering in groups', talking to each other, or plotting crimes, and to provide a basis for interrogation and search of known addicts where possession is suspected but where the police lack the probable cause necessary to make an arrest for possession.(This act is presently under attack as unconstitutionally vague. Ricks v. United States, Williams v. United States, Nos. 4163, 4164, D.C. Ct. App. [1966]. See also Ricks v. District of Columbia, No. 4165, D.C. Ct. App. [1966]. The U.S. Attorney presently requires three 'observations' before prosecution will be authorized (interview with Assistant U.S. Attorney David N. Ellenhorn, Aug. 17, 1965.). In fiscal 1965 there were 165 arrests (Information supplied by Statistical Division, Metropolitan Police Department, Washington, D. C. [hereinafter cited as MPD], confirmed by letter from John B. Layton, Chief of Police, July 6, 1966. [179 arrests under the Uniform Narcotics Act, 16 under the Dangerous Drug Act, 165 under the Narcotics Vagrancy Act, and 18 for forgery of narcotics

prescriptions].); prosecutions under the act average about 50 per year. (Interview with Assistant U. S. Attorney David N. Ellenhorn, Aug. 17, 1965.)

Here the charge of vagrancy appears to be entirely frivolous and spurious because there appears to be no basis whatever for the charge since appellant was peaceful, sober and merely walked over to the car and answered certainquestions on request. It therefore must fall as a matter of due process. Thompson v. Louisville, 362 U. S. 199 (1960); Garner v. Louisiana, 368 U. S. 157 (1961); Fields v. Fairfield, 375 U. S. 248 (1963).

In Beck v. Ohio, 379 U. S. 89, 91 (1964), it is stated that probable cause to arrest without a warrant exists when "at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

On June 16, 1966, Judge Harold H. Greene rendered an Opinion in the case of District of Columbia v. Hattie Mae Ricks, Criminal Action No. DC 3050-66, in which defendant was charged with being a vagrant in violation of Title 22-3302 D. C. Code, which is most interesting because it involves the same police officers as in the instant case, namely, Willard Kuntz and Ronald P. Jenkins,

and the Judge makes some comments regarding their testimony.

In his Opinion, Judge Greene states as follows:

> "Some examples from the testimony illustrate that preventive detention and conviction on suspicion are central to this law. Officer Willard Kuntz arrested defendant for vagrancy rather than for soliciting prostitution because he 'could not make a proper arrest or a proper prosecution on grounds of prostitution.' Vagrancy is charged 'in cases where [the officers] feel that there is prostitution or sodomy going on but [they] cannot make a case.' Officer Ronald P. Jenkins corroborated that the defendant could not be arrested for soliciting prostitution 'because all the elements [of that offense] were not there.' A 'person might be a real smooth operator and I might not be able to catch them' soliciting prostitution or dealing in narcotics; he is then charged with vagrancy. According to the chief prosecutor (Clark King, chief of the law enforcement division of the D. C. Corporation Counsel's Office, with major responsibility for criminal litigation, was a witness for the government.) who testified at the trial, 'you certainly don't have to wait until a person goes in and engages in the act of prostitution before you can see fit to arrest that person for being a vagrant;' the law is used where there is probable cause to believe that the person will commit a crime.
>
> "In sum, those charges with the enforcement responsibility proceed on the assumption that vagrancy arrests should be made when criminal activities are suspected but a substantive offense cannot be proved.
>
> "While these views are obviously not binding on the courts, they cast a revealing light upon the law as viewed by those most familiar with its enforcement. In determining the validity of a statute on its face it is proper to consider its actual operation. (Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886); United States v. Mississippi, 380 U.S. 128, 143 (1965). The officers had instructions

> from their superiors and from the prosecutor's office on vagrancy law enforcement and standards for arrests.) "

In general, Judge Greene concluded that:

> "It is only because I strongly believe in the duty of trial judges to follow the precedents established by higher courts that I shall find the defendant guilty; but I fully expect that eventually the D. C. vagrancy statute will be determined to be unconstitutional." (Page 15 of Opinion.)

Appellant also contends that there was ineffective assistance of counsel under the Sixth Amendment of the Constitution in that on direct examination in connection with the Motion to Suppress Evidence hearing there was no testimony presented of prior felony convictions but that on cross-examination information was supplied, which is of importance in consideration of the vagrancy charge.

II. The Vagrancy Statute Title 22-3302 D. C. Code (1967 Ed.) under which appellant was originally charged is unconstitutional because of vagueness, uncertainty and indefiniteness.

A Statute that fails to give clear and explicit notice that certain conduct is proscribed cannot be constitutionally enforced. Lanzetta v. New Jersey, 306 U. S. 451 (1939)

> "...A law fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves the judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Giacco v. Pennsylvania, 382 U. S. 399, 402-03 (1966)."

Several key criteria of criminality in the vagrancy statute fall under Lanzetta, supra. It is difficult to find with particularity what the following statutory language means "not giving a good account of himself" "found loitering", "leading an immoral and profligate life", "who wanders about the streets at late and unusual hours of the night without any visible and lawful business." Furthermore why should a person who has confessed or been convicted of a felony in the District of Columbia and served his time be placed under the cloud of having to explain his peaceful activity at anytime upon demand of plain-clothes men? This is contra to all principles of rehabilitation of persons convicted of crime. Any such person should not have his Constitutional rights violated in this manner.

Williams v. District of Columbia, 65 A. 2d. 924 (Mun. App. D. C. 1949) is sometimes cited as having defined the meaning of loitering. There the Court quoted the following definition:

> "To loiter, according to the lexicographers, means to be slow in moving, to delay, to linger, to be dilatory, to spend time idly, to saunter, to lag behind."

The Court added:

> "There is a time element in loitering; but the particular amount of time required depends on the circumstances."

Thus, the attempted definition uses equally vague words and phrases, and the vagueness is then compounded by the addition of a time element that "depends on the circumstances".

At the outset we must determine whether the vagrancy laws are violated by a failure to give a "good account" if a citizen simply remains silent when an accounting is demanded of him by a police officer. Even the Courts are in conflict on this issue. Compare Beail v. District of Columbia, 82 A. 2d. 765 (Mun. App. D. C. 1951), rev'd. on other grounds, 91 U. S. App. D. C. 110, 201 F. 2d. 176 (1952) (answer required) with Green v. United States, 104 U. S. App. D. C. 23, 259 F. 2d. 180 (1958), cert. den., 359 U. S. 917 (citizen has an absolute right to refuse to answer officer); Cf. Escobedo v. Illinois, 373 U. S. 473 (1964).

A recent Federal decision holds a New Jersey "good account" statute to be void for vagueness:

> "We believe that the term 'good account' fails to pass these [constitutional] tests. It leaves too much discretion in the hands of the police and the courts. It does not involve a certain standard, for what may be a good account to one person may very easily not be one to another. The word 'good' is especially subjective in nature and is used in our parlance in many different ways and contexts. Does it mean morally 'good' or does it mean 'lawful' in the sense that if one does not admit to a crime he has given a good account of himself? On the other hand, 'good account' may mean an account which puts the accused above suspicion or it may mean that his statement must give the officer sufficient credible information so as to negate probable cause." United States v. Margeson, 259 F. Supp. 256 (1966)

The opinion in Harris v. District of Columbia, 192 A. 2d. 814 (Mun. App. D. C. 1963) does not answer these criticisms. There the Court defined a good account as "one that is reasonably credible". Credible to whom? On what criteria?

The ultimate in vagueness is the term "vagrancy" itself. In the trial transcript of the case of Hattie Mae Ricks, the difficulties of law enforcement officers in defining the term "vagrants" is revealed. One experienced police officer there equated "vagrants" with "undesirables" (Tr. A. 37). An undesirable he considered to be a prostitute, a junkie, a thief, a pervert, "and what have you. The rest." (Tr. A. 37-38). He also described the Second Precinct where he had served as a

policeman for six years as "a hole . . . a den of vice." (Tr. A. 41) Having defined vagrants as undesirables, and undesirables as thieves, he added "there is nothing but thieves in the entire precinct", although as an afterthought he added "there may be some decent people there." (Tr. A. 41). If this logic is carried to its ultimate conclusion it would appear that the offense of vagrancy is broad enough for the arrest of almost everyone in the Second Precinct; and also for arrest of a great many others in the District of Columbia simply because the particular police officer considered them undesirables and hence vagrants.

Similar arguments can be made concerning other language in the vagrancy statute.

Serious Constitutional questions are raised by severe limitations under freedom of movement under the narcotics vagrancy statute. Wilson v. United States, 366 F. 2d. 666 (1966). In that opinion the Court indicated that freedom of movement is basic to our scheme of values, that freedom of travel is a Constitutional liberty related closely to the rights of free speech and association. Aptheker v. Secretary of State, 378 U. S. 500, 517 (1964).

Since vagrancy statutes refer to past criminal acts of a defendant by making prior convictions an element of the crime, this makes a fair trail unlikely in a vagrancy prosecution. Cf. Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213 (1948); see Marshall v. United States, 360 U. S. 310, 79 S. Ct. 117 (1958); Drew v.

United States, 118 U.S. App. D.C. 11, 15-16 (1964).

There is also a well-reasoned lengthy opinion of Judge Tim Murphy of the District of Columbia Court of General Sessions, Criminal Division, in District of Columbia v. Wardell Hicks, Criminal No. DC 34194-66 (May 4, 1967). In that opinion, he states "except in most unusual cases of vagrancy arrests should be by warrant." The desirability of an arrest by warrant has been strongly suggested by the United States Supreme Court, Beck v. Ohio, 379 U.S. 89 (1964). He concluded that Section 8 of the Vagrancy Statute is unconstitutional. This section concerns any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

It is indeed time to review and declare unconstitutional the vague, uncertain and indefinite vagrancy statute of the District of Columbia.

III. It is reversible error for the District Court to refuse to give Appellant in advance of trial and on his request copy of the sworn testimony of a police officer given in open Court on Motion to Suppress Evidence so that Appellant could properly prepare for cross-examination at trial.

Appellant contends that prior to trial he requested a copy of the transcript of the sworn testimony of Officer Kuntz given in open Court at the hearing on the Motion to Suppress Evidence. The purpose of

requesting such transcript was in order that appellant could be prepared in cross-examining Officer Kuntz who presumably would be required to testify the same at trial as he had at the hearing in open Court on the Motion to Suppress Evidence. In this connection, see recent decision of this Court Jerome Worthy v. United States No. 20359, decided August 11, 1967.

IV. It is reversible error for the District Court to refuse to grant Appellant's two pro se Motions prior to trial for termination of services of his Court-appointed counsel where Appellant alleged as grounds lack of communication and other reasons.

The Statement of the Case contains from the transcript a complete statement of the argument pro se of Worthy as to the reasons why he did not want his Court-appointed counsel to continue to represent him, such reasons including lack of communication and lack of confidence in the efforts being made by counsel on his behalf. Under these circumstances, appellant contends that he was denied due process of law and a fair trial.

V. Appellant was denied a speedy trial guaranteed under the Sixth Amendment of the Constitution when elapsed time from indictment to trial was more than eleven months, namely, February 18, 1966 to January 24, 1967.

The length of delay in this case being unsatisfactorily explained

was excessive. Appellant further contends that a witness on his behalf died in the District of Columbia during this period and due to delay his defense trial was prejudiced contrary to the protections of the Sixth Amendment of the Constitution. Appellant contends that he, pro se, attempted to file a motion to dismiss the indictment for denial of right to a speedy trial on September 27, 1966, but this motion was returned to appellant on September 30, 1966, by the Clerk of the Court because appellant had failed to make his motion through his attorney of record. Appellant contends that he had lost confidence in his Court-appointed counsel and filed this motion pro se and that the motion should have been heard and decided.

VI. Appellant was deprived of his Constitutional rights to a fair trial under the Fifth and Sixth Amendments of the Constitution through ineffective assistance of counsel.

Appellant contends that, as previously indicated in the section on Argument of the Motion to Suppress Evidence that the Government failed to make out a case, particularly when it failed to establish any prior conviction of a felony, which is one of the requirements involved under the Vagrancy Statute. Appellant contends that this omission was supplied through the cross-examination which may have been a factor in the denial of the Motion to Suppress Evidence.

CONCLUSION

Appellant respectfully submits that this Court should reverse the decision below and enter appropriate relief.

Respectfully submitted,

Thomas M. Raysor
Attorney Appointed by
This Court to Represent
Appellant in this Case.

John B. Olverson
Co-Counsel Appointed
by This Court to Represent
Appellant in this Case.

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1700 Pennsylvania Avenue, N.
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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20888

JOHN L. WORTHY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
NICHOLAS S. NUNZIO,
CARL S. RAUH,
Assistant United States Attorneys.

Cr. No. 189–66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Did the police have probable cause to believe appellant was violating the District of Columbia vagrancy laws in their presence, where (a) appellant was observed on four separate occasions loitering with known prostitutes and narcotics addicts and a thief during the early morning hours in an area known for illicit activities, (b) appellant was known to have been convicted of narcotics and larceny offenses as well as a felony, (c) appellant told the police that he had no lawful occupation and supported himself by stealing, and (d) appellant failed to explain his presence on the street at such a late hour?

(2) (A) Was appellant denied a transcript of the motion to suppress hearing for use at trial where he never requested it?

(B) Did the trial court abuse its discretion in denying appellant's *pro se* motion to terminate his court-appointed counsel where the court-appointed counsel represented to the court that he could effectively represent appellant if appellant would cooperate?

(C) Was appellant denied his right to a speedy trial by the eleven month delay between indictment and trial where the delay was not "arbitrary, purposeful, oppressive or vexatious" and no prejudice resulted?

(D) Was appellant denied effective assistance of counsel because of one question his court-appointed attorney asked during cross-examination of the arresting police officer at the motion to suppress hearing?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20888

JOHN L. WORTHY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Worthy was charged in a two-count indictment (Cr. No. 189–66) with purchasing and selling narcotics not in the original stamped package (26 U.S.C. § 4704(a)) and with facilitating the concealment and sale of narcotics imported contrary to law (21 U.S.C. § 174). A motion to suppress was heard and denied by District Judge Sirica on April 29, 1966 (MS Tr. 1, 18).[1] Appellant's trial took place on January 24, 1967 before a jury and District Judge Sirica; the jury returned a verdict of guilty as charged. On March 23, 1967 appellant

[1] The trial transcript is referred to as "Tr." The transcript of the motion to suppress hearing before Judge Sirica on April 29, 1966 is referred to as "MS Tr." The transcript of the hearing on appellant's *pro se* motion to terminate the services of his court-appointed counsel before Judge McGuire on June 10, 1966 is referred to as "MT 1 Tr." The transcript of the hearing on appellant's *pro se* motion to terminate the services of his court-appointed counsel before Judge Gasch on August 12, 1966 is referred to as "MT 2 Tr."

was sentenced to imprisonment for 10 years.[2] This sentence runs concurrently with the 10 year sentence appellant received on June 13, 1966 in Cr. No. 532–65.[3]

Motion To Suppress Hearing

The Government's evidence at the hearing showed that Detectives Willard S. Kuntz and Ronald P. Jenkins, Second Precinct Vice Squad, Metropolitan Police Department, had the midnight to 8:00 a.m. tour of duty on October 20, 1965 (MS Tr. 9–10, 11). While patrolling in a police car the 1200 block of 7th Street, Northwest, at about 2:00 a.m. on October 20, 1965, Detective Kuntz and Jenkins observed appellant loitering in front of 1236 7th Street which is "a house of ill fame" (MS Tr. 11, 14). Appellant was with Carmelita Lindsay, a convicted prostitute and thief and a known narcotics violator and vagrant, and Suzie May Jackson, a known prostitute and vagrant (MS Tr. 11, 14).[4] Detective Kuntz had seen appellant before and knew his police record which consisted in part of convictions for larceny from the United States mail, forgery, petit larceny, and narcotics (MS Tr. 7, 13, 14).

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[2] Appellant received the mandatory minimum sentence. 26 U.S.C. § 7237; 21 U.S.C. § 174. Appellant received concurrent 10 year sentences. Appellant was a third offender under 26 U.S.C. § 4704(a) (see Cr. No. 488–60 and Cr. No. 532–65). Appellant was a second offender under 21 U.S.C. § 174 (see Cr. No. 532–65).

[3] Appellant was charged on May 10, 1965 in a six-count indictment (Cr. No. 532–65) with violating the federal narcotics laws (26 U.S.C. §§ 4704(a), 4705(a); 21 U.S.C. § 174). On April 25, 1966, appellant was convicted by a jury on all counts of the indictment; the evidence showed that appellant sold narcotics to an undercover agent on two separate occasions. On June 13, 1966 appellant received the mandatory minimum sentence of 10 years imprisonment. 26 U.S.C. § 7237; 21 U.S.C. § 174. Appellant had a previous conviction under 26 U.S.C. § 4704(a) (see Cr. No. 488–60). On February 17, 1967, appellant's conviction in Cr. No. 532–65 was affirmed by order.

The record office at Lorton Reformatory reports that appellant is presently scheduled for release on August 14, 1972. This release date takes into account 348 days credit for pre-trial confinement (18 U.S.C. § 3568), 1293 days credit for statutory good time (18 U.S.C. § 4161) and 40 days credit for industrial good time (18 U.S.C. § 4162). If appellant continues his industrial employment at Lorton Reformatory, he will earn an additional 6 months industrial good time by February, 1972, and will be released at that time.

[4] Both these women were known narcotics users (Tr. 13).

Detectives Kuntz and Jenkins also had the midnight to 8:00 a.m. tour of duty on October 21, 1965 (MS Tr. 10–11). About 12:30 a.m. on October 21, 1965, Detectives Kuntz and Jenkins observed appellant in front of 1236 7th Street in the company of Carmelita Lindsay (MS Tr. 11, 15).[5] About 1:30 a.m. on October 21, 1965, appellant was observed again with Carmelita Lindsay by these officers, this time in front of 1237 7th Street (MS Tr. 11). At approximately 2:00 a.m. appellant was observed by these officers for the third time during the early morning of October 21, 1965 loitering with Carmelita Lindsay in the 1200 block of 7th Street (MS Tr. 11).[6] Detective Kuntz at this time asked appellant his name, date of birth and home address (MS Tr. 11). Appellant was then asked what his occupation was and he replied that he had none (MS Tr. 11). Appellant was then asked how he supported himself to which appellant replied that he supported himself by "hustling" or "stealing" (MS Tr. 11). Detective Kuntz finally asked appellant why he was out at this time of night and appellant answered that "he was just out" (MS Tr. 11–12). Appellant was then advised that he was under arrest for vagrancy (MS Tr. 12, 16, 17). Detective Kuntz searched appellant "for a weapon" incident to his arrest; Detective Kuntz found in appellant's right coat pocket a bottle containing 53 capsules of suspected heroin and seized it (MS Tr. 12, 17).

Appellant testified at the hearing (MS Tr. 4–9). Appellant claimed that he was alone during the early morning hours of October 20 and 21, 1965 and not in the company of Carmelita Lindsay[7] or Suzie May Jackson (MS Tr. 6–8). Appellant also claimed that he was on his way to the store when stopped to talk to the police officers and that he told the officers this (MS Tr. 4–5, 8). Appellant admitted that in his conversation with the police officers he informed them of some of the crimes for which he had been arrested (MS Tr. 5). Appellant also testi-

[5] See Tr. 37.

[6] Appellant was also in the company of Suzie May Jackson and Frances Alston, a known prostitute and narcotics violator, at 2:00 a.m. on October 21, 1965 (MS Tr. 15; Tr. 13).

[7] At trial, appellant denied even knowing Carmelita Lindsay (Tr. 50).

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fied that he was searched before he was told he was under arrest (MS Tr. 5, 9).[8]

Hearings on Appellant's Motions to Terminate Counsel

On June 1, 1966, appellant filed a *pro se* motion to terminate the services of his court-appointed counsel.[9] The motion was heard on June 10, 1966 by District Judge McGuire who denied the motion noting that "this is one of those self-serving pro se motions" (MT 1 Tr. 1).

On August 4, 1966, appellant filed another *pro se* motion to terminate the services of his court-appointed counsel. This motion was heard on August 12, 1966 by District Judge Gasch. Appellant's major contention was that his counsel was "not putting forth any effort" in his behalf (MT 2 Tr. 7). Appellant, speaking for himself, made the following claims: (1) that his court-appointed counsel did not appear in the Court of General Sessions on December 2, 1965 and February 18, 1966 to represent appellant on the vagrancy charge (MT 2 Tr. 4–5), (2) that his court-appointed counsel did not appear in the United States District Court on December 10, 1965 to represent appellant at a motion for reduction of bond (MT 2 Tr. 4–5), (3) that his attorney did not file enough motions (MT 2 Tr. 6), (4) that his attorney did not obtain the police statement of facts (MT 2 Tr. 6), (5) that his attorney did not call Detective Jenkins to testify at the motion to suppress hearing (MT 2 Tr. 5), and (6) that his attorney had not consulted with him enough (MT 2 Tr. 6–7).

Appellant's attorney represented to the court that appellant "doesn't seem to be satisfied that I am fighting hard enough for him" (MT 2 Tr. 3). Appellant's attorney further represented that he had conferred with appellant "on many occasions" (MT 2 Tr. 3). In response to an inquiry from the court, appellant's attorney stated, "Yes, I can effectively represent

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[8] At trial, appellant claimed that it was Detective Jenkins who arrested and searched him (Tr. 46).

[9] Attorney Richard A. Micheel was appointed to represent appellant by the District of Columbia Court of General Sessions on October 21, 1965 and by the United States District Court for the District of Columbia on February 24, 1966.

this man, Your Honor, if I can get some cooperation from him" (MT 2 Tr. 9).

The trial court denied appellant's motion to terminate the services of his court-appointed counsel. In so doing, the court stated to appellant:

> You should have counsel to represent you. If I felt that there was any disinclination on the part of Mr. Micheel to effectively represent you I would removed [*sic*] him as counsel. So, on the basis of what you have told me and what Mr. Micheel has said, I believe the best advice I can give you is to cooperate with your counsel and recognize that he is performing a professional duty and obligation and that it is up to you to give him the facts. And it is up to him to put forth what he can as a lawyer in support of your defense. (MT 2 Tr. 10.)

The Trial

The Government's evidence at trial showed that Detective Kuntz accompanied by Detective Jenkins arrested appellant for vagrancy at approximately 2:18 a.m. on October 21, 1965 in the 1200 block of 7th Street, Northwest (Tr. 4–6, 32). Detective Kuntz searched appellant incident to the arrest and seized from appellant's right coat pocket an unstamped plastic vial containing 53 capsules of a light powder; also seized was a set of narcotics paraphernalia (Tr. 6–7, 9–10, 32–33). The 53 capsules were turned over to Officer Winston Norman of the Narcotics Squad who in turn transferred the 53 capsules to John A. Steele, an analytical chemist for the Internal Revenue Service (Tr. 8–10, 16–19, 20). Mr. Steele, an expert in analyzing narcotic drugs, determined that "in each one of the 53 capsules" there was "heroin hydrochloride, a derivative of opium, a narcotic drug" (Tr. 21–23). The capsules were admitted into evidence over appellant's objection (Tr. 25).

Appellant, testifying in his own behalf, admitted possession of the 53 capsules (Tr. 46). Appellant claimed, however, that he saw a dope peddler hide the capsules under a trash can in an alley at 11:30 p.m. on October 20, 1965 which was about three hours prior to his arrest (Tr. 47–48). Although appellant did

not know the dope peddler's name, he knew he was a peddler because he (appellant) "had purchased from him before through someone else" (Tr. 48, 51). Appellant testified that he took the capsules from underneath the trash can and proceeded to a gas station where he unsuccessfully attempted to cook up [10] two of the capsules for a shot (Tr. 48–50, 52). Appellant further claimed that although he thought the capsules contained heroin when he stole them, after two capsules would not cook up, he assumed all the capsules contained "milk sugar" (Tr. 47, 49, 50, 52). Nevertheless, appellant admitted that he did not throw away the allegedly worthless capsules but rather carried them in his coat pocket for over two hours prior to his arrest (Tr. 50–52).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the Constitution of the United States, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment of the Constitution of the United States, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

[10] To "cook up" means to combine the heroin powder with a little water in a cooker (oftentimes a bottle top or spoon) and then apply heat to the cooker so that the powder will dissolve in the water. This produces a solution that can be used for a hypodermic injection. (Tr. 49, 52.)

process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21, United States Code, Section 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, United States Code, Section 4704(a), provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prime facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 4, District of Columbia Code, Section 140, provides:

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall

commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

Title 4, District of Columbia Code, Section 143, provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District jail or penitentiary not exceeding two years, or by a fine not exceeding $500.

Title 22, District of Columbia Code, Section 3302, provides in pertinent part:

> The following classes of persons shall be deemed vagrants in the District of Columbia:
>
> (1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his own confession or by his having been convicted in the District of Columbia or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any park, highway, public building, or other public place, store, shop, or reservation, or at any public gathering or assembly.
>
> * * * * *
>
> (3) Any person leading an immoral or profigate [*sic*] life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source.
>
> * * * * *
>
> (8) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

Title 33, District of Columbia Code, Section 416(a), provides in pertinent part:

> (a) The purpose of this section is to protect the public health, welfare, and safety of the people of the District of Columbia by providing safeguards for the people against harmful contact with narcotic drug users who are vagrants within the meaning of this section and to establish, in addition to the Hospital Treatment for Drug Addicts Act for the District of Columbia, further procedures and means for the care and rehabilitation of such narcotic drug users.
>
> (b) For the purpose of this section—
>
> (1) the term "vagrant" shall mean any person who is a narcotic drug user or who has been convicted of a narcotic offense in the District of Columbia or elsewhere and who—
>
> (A) having no lawful employment or visible means of support realized from a lawful occupation or source, is found mingling with others in public or loitering in any park or other public place and fails to give a good account of himself; or
>
> * * * * *
>
> (C) wanders about in public places at late or unusual hours of the night, either alone or in the company of or association with a narcotic drug user or convicted narcotic law violator, and fails to give a good account of himself.

SUMMARY OF ARGUMENT

I

The police had probable cause to believe that appellant was violating the District of Columbia vagrancy laws in their presence; therefore, appellant's arrest was lawful and the narcotics seized from him were properly admitted into evidence. Appellant was observed by the arresting police officers on four separate occasions loitering with known prostitutes and nar-

cotics addicts and a thief during the early morning hours in an area known for illicit activities. The police knew prior to arresting appellant that appellant had been convicted of narcotics and larceny offenses as well as a felony. Appellant before his arrest told the police that he had no lawful occupation and supported himself by stealing. Appellant failed to explain his presence on the street at such a late hour when explicitly asked to do so by the police. Under these circumstances, appellant's arrest was lawful.

II

(A) Appellant cannot claim that the trial court denied him a transcript of the motion to suppress hearing for use at trial since he never requested it.

(B) The trial court did not abuse its discretion in denying appellant's *pro se* motion to terminate his court-appointed counsel where the court-appointed counsel represented to the court that he could effectively represent appellant if appellant would cooperate. *Brown* v. *United States*, 105 U.S. App. D.C. 77, 264 F. 2d 363 (*en banc*), *cert. denied*, 360 U.S. 911 (1959).

(C) Appellant was not denied his right to a speedy trial by the eleven month delay between indictment and trial where the delay was not "arbitrary, purposeful, oppressive or vexatious" and no prejudice resulted. *Ewell* v. *United States*, 383 U.S. 116 (1966); *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 364 F. 2d 684 (1966).

(D) Appellant was not denied effective assistance of counsel because of one question his court-appointed attorney asked during cross-examination of the arresting police officer at the motion to suppress hearing. *Harried* v. *United States*, No. 20372, D.C. Cir., November 30, 1967; *Bruce* v. *United States*, — U.S. App. D.C. —, 379 F. 2d 113 (1967).

ARGUMENT

I. The trial court properly denied appellant's motion to suppress

(Tr. 4, 13, 34; MS Tr. 5, 7, 11–16)

a. The police had abundant probable cause to arrest appellant for violating the District of Columbia vagrancy laws

Appellant contends that his arrest was unlawful since the police did not have probable cause to believe he was committing a misdemeanor in their presence; and therefore, the narcotics seized from appellant at the time of his arrest should have been suppressed.[11] The Government believes and will demonstrate that the police had abundant probable cause to believe that appellant was violating the District of Columbia vagrancy laws in their presence; and therefore, the narcotics seized from appellant at the time of his arrest were properly admitted into evidence.[12]

Probable cause for arrest exists if the "officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302, F. 2d 194, 196 (1962). In the instant case, the police had made ample observations and had sufficient information to believe that appellant was violating the District of Columbia vagrancy laws.[13]

Appellant's arrest for violating the District of Columbia vagrancy laws was based upon the following facts: (1) Detec-

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[11] Brief for Appellant, pp. 17–30.

[12] "Unquestionably, when a person is lawfully arrested, the police have the right without a search warrant, to make a contemporaneous search of the person of the accused * * *" *Preston* v. *United States*, 376 U.S. 364, 367 (1964). And, of course, the evidence uncovered by a search incident to a lawful arrest may be used to prove additional and separate crimes. *E.g.*, *Johnson* v. *United States*, 125 U.S. App. D.C. 243, 370 F. 2d 489 (1966); *Smith* v. *United States*, 122 U.S. App. D.C. 339, 353 F. 2d 877 (1965); *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 345 F. 2d 964, *cert. denied*, 382 U.S. 894 (1965). Appellant does not argue otherwise.

[13] See "The Narcotic Vagrancy Statute" 33 D.C. Code § 416a(b)(1) (A) and (C); "General Vagrancy Statute" 22 D.C. Code § 3302(1), (3) and (8).

tive Kuntz knew that appellant had a prior narcotics conviction, a prior felony conviction, and two prior larceny convictions; in addition, Detective Kuntz knew that appellant was a thief since appellant had informed the officer that he made his living by stealing (MS Tr. 5, 7, 11, 13, 14). (2) Detectives Kuntz and Jenkins [14] had observed appellant on four separate occasions loitering during the early morning hours in the 1200 block of 7th Street, Northwest; specifically, appellant was observed by the police at 2:00 a.m. on October 20, 1965 and at 12:30 a.m., 1:30 a.m. and 2:00 a.m. on October 21, 1965 (MS Tr. 11, 14, 15). (3) The 1200 block of 7th Street, Northwest, is an area frequented by narcotics offenders and prostitutes.[15] (4) On all four occasions that appellant was observed loitering during the early morning hours of October 20 and 21, 1965, he was in the company of Carmelita Lindsay, a known prostitute, thief and narcotics user, and on two of the four occasions, appellant was also in the company of other prostitutes and narcotics addicts (MS Tr. 11, 14, 15; Tr. 13). (5) At 2:00 a.m. on October 21, 1965, Detective Kuntz questioned appellant (MS Tr. 11–12). Appellant was asked what his occupation was; appellant replied that he had none (MS Tr. 11). (6) Appellant was also asked how he supported himself to which appellant replied that he supported himself by "hustling" or "stealing" (MS Tr. 11). (7) Finally, appellant was specifically asked why he was out on the street at 2:00 a.m. in the morning; appellant replied that "he was just out" (MS Tr. 11–12).[16]

Because appellant was observed on four occasions loitering with known prostitutes and narcotics addicts and a known thief

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[14] Detectives Kuntz and Jenkins were experienced police officers familiar with the 1200 block of 7th Street, Northwest. At trial both officers testified that they had been assigned to the vice squad of the Second Precinct for over four years (Tr. 4, 34).

[15] This Court should take judicial notice of the fact that the 1200 block of 7th Street, Northwest, is an area frequented by narcotics offenders and prostitutes. *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 356 n. 1, 372 F. 2d 928, 929 n. 1 (1967) (this Court recognized that 14th and U Streets, Northwest, is an area where much "narcotics peddling" occurs). See Government's Brief, p. 5, *Ricks* v. *United States*, 228 A. 2d 316 (D.C. Ct. App. 1967) (discussion of the 1200 block of 7th Street, Northwest).

[16] Detective Kuntz complied with the command of *Beail* v. *District of Columbia*, 91 U.S. App. D.C. 110, 201 F. 2d 176 (1952) in explicitly asking appellant his reason for being out on the street at such a late hour.

during the early morning hours in an area known for illicit activities, because appellant was known to have been convicted of narcotics and larceny offenses as well as a felony, because appellant admitted that he had no lawful occupation and supported himself by stealing, and because appellant failed to explain his presence on the street at such a late hour, Detective Kuntz arrested appellant for violating the District of Columbia vagrancy laws. Under these circumstances, the arrest was proper.[17] *Ricks* v. *United States*, 228 A. 2d 316 (D.C. Ct. App. 1967); *Coley* v. *District of Columbia*, 177 A. 2d 889 (Mun. Ct. App. 1962); *Jenkins* v. *United States*, 146 A. 2d 444 (Mun. Ct. App. 1958); *Harris* v. *District of Columbia*, 132 A. 2d 152 (Mun. Ct. App. 1957), *rev'd on other grounds*, 102 U.S. App. D.C. 202, 251 F. 2d 913 (1958); *Beail* v. *District of Columbia*, 82 A. 2d 765 (Mun. Ct. App. 1951), *rev'd on other grounds*, 91 U.S. App. D.C. 110, 201 F. 2d 176 (1952). See *Freeman* v. *United States*, 116 U.S. App. D.C. 213, 322 F. 2d 426 (1963). Most recently the District of Columbia Court of Appeals in *Ricks* v. *United States*, *supra* at 322, stated:

> But when an individual is unable to give a good account; when he is wandering at late and unusual hours and is associated with criminals or narcotics users and is not lawfully employed; these factors, together with those earlier enumerated [*E.g.*, that the individual is a felon,

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[17] Appellant argues *ad nauseam* that his arrest was a sham. He claims that he was arrested not because he was violating the vagrancy laws but because the police wanted to search him for narcotics. See Brief for Appellant, pp. 18–19, 25, 28). There is nothing in the record of this case to show that the police arrested appellant for any reason other than that he was violating the vagrancy laws. The police had a right and a duty to arrest appellant for violating these laws. 4 D.C. Code § 140 (1967); 4 D.C. Code § 143 (1967). Similar non-supported contentions of sham arrests have been rejected by this Court. *Johnson* v. *United States*, 125 U.S. App. D.C. 243, 370 F. 2d 489 (1966); *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 345 F. 2d 964, *cert. denied*, 382 U.S. 894 (1965).

Appellant also suggests that the fact that the vagrancy charge was *nolle prossed* proves that the vagrancy arrest was a sham. Brief for Appellant, p. 25. Of course, the record does not support such reasoning. The Corporation Counsel's Office *nolle prossed* the vagrancy charge because appellant had been in jail for six months (MS Tr. 16). Certainly, a subsequent decision to forego prosecution of the original offense does not invalidate the arrest made on the street.

> a pickpocket, a thief, a narcotic drug user or a person who has been convicted of a narcotics offense], constitute probable cause for arrest.

b. Appellant's belated attack upon the constitutionality of the District of Columbia vagrancy laws has absolutely no bearing upon the validity of his arrest

Appellant contends for the first time on appeal that the District of Columbia vagrancy laws under which he was arrested are unconstitutional. Appellant's failure to raise this issue in the trial court precludes him from raising it at the appellate level. *Schmerber* v. *California*, 384 U.S. 757, 765–66 n. 9 (1966); *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F. 2d 126 (1962), *cert. denied*, 374 U.S. 838 (1963); *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

The Government's position is that since the conviction in this case is for violating the Federal narcotic laws and not the District of Columbia vagrancy laws, the constitutionality of the District of Columbia vagrancy laws is not an issue properly before this Court. Since the District of Columbia vagrancy laws are relevant only to the issue of probable cause for the arrest, this Court need not consider their constitutionality.[18] The Government relies on *Johnson* v. *United States*, 125 U.S. App. D.C. 243, 245 n. 2, 370 F. 2d 489, 491 n. 2 (1966) where this Court refused to consider the constitutionality of District of Columbia disorderly conduct statute in a case where the defendant was arrested for disorderly conduct but convicted of carrying a pistol without a license. In *Johnson* v. *United States, supra* at 245 n. 2, 370 F. 2d at 491 n. 2, this Court stated:

> Another matter raised by the court at argument, and discussed in the supplemental briefs, was the possible unconstitutionality, for vagueness, of D.C. Code § 22–1107, defining disorderly conduct. *Since this statute is relevant in this case only to the issue of probable cause for the arrest we need not consider the constitutional issue. Appellant's appeal is from a conviction of carry-*

[18] The constitutionality of the District of Columbia vagrancy laws is properly before this Court in (*Hattie Mae*) *Ricks et al.* v. *United States et al.*, D.C. Cir. No. 20919.

> *ing a concealed weapon without a license, not of disorderly conduct. The existence of the disorderly conduct statute was a factor properly to be considered by the arresting officer in determining whether probable cause existed to arrest appellant for conduct in the officer's presence and defined in the statute as a crime.* [Emphasis added.]

The above holding fully disposes of the identical contention made on this appeal.

This Court in *Johnson* recognized that in determining the legality of an arrest the only issue to be decided is whether the police had probable cause to believe the defendant was violating an existing law.[19] In the instant case, the police acted reasonably in arresting appellant for violating the existing vagrancy laws which have been repeatedly sustained as constitutional by the courts of this jurisdiction. *E.g., Ricks* v. *United States,* 228 A. 2d 316 (D.C. Ct. App. 1967) *Brooke* v. *United States,* 208 A. 2d 726 (D.C. Ct. App. 1965); *Hicks* v. *District of Columbia,* 197 A. 2d 154 (D.C. Ct. 1964), *cert. dismissed,* 383 U.S. 252 (1966); *Thomas* v. *District of Columbia,* 161 A. 2d 52 (Mun. Ct. App. 1960); *Jenkins* v. *United States,* 146 A. 2d 444 (Mun. Ct. App. 1958). The police officers in the instant case were not only authorized but constrained to arrest appellant for his flagrant violation of the vagrancy statutes. 4 D.C. Code § 140 (1967); 4 D.C. Code § 143 (1967) (police officers are subject to imprisonment and fines for failing to arrest individuals committing misdemeanors in their presence).

Appellant has requested this Court to exclude the narcotics because the laws under which he was arrested are unconstitutional; however, appellant has failed to explain how this exclusion would further the purposes of the exclusionary rule. The

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[19] A similar principle governs the closely related question of civil liability for false arrest. A claimant cannot maintain his suit if the police officer acted with probable cause. See *Director General of Railroads* v. *Kastenbaum,* 263 U.S. 25 (1923). As the Supreme Court recently stressed in *Pierson* v. *Ray,* 386 U.S. 547, 557 (1967): "a police officer is not charged with predicting the future course of constitutional law." A police officer consequently may invoke the defense of good faith and probable cause against charges of either false or unconstitutional arrest. Probable cause is in no way retroactively diminished by a new judicial interpretation of the offended statute.

purposes of the exclusionary rule are to deter the police from acting unreasonably and to ensure that they act reasonably. *E.g., Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Weeks* v. *United States,* 232 U.S. 383 (1914). The police in the instant case acted reasonably under the Constitution in arresting appellant for his clear violation of existing vagrancy laws. To exclude the narcotics because the vagrancy laws are subsequently determined unconstitutional would not further any of the purposes of the exclusionary rule.[20] If anything, it would tend to discourage the police from enforcing the law. Such a result is undesirable. "The general public welfare, and more especially the peace and good order of society, will not admit of ministerial officers being the judge of the constitutionality of statutes and ordinances. Their failure and refusal to enforce the law as written, in the absence of any proper adjudication of unconstitutionality, would be intolerable." *Bricker* v. *Sims,* 195 Tenn. 361, 369, 259 S.W. 2d 661, 665–65 (1953).

II. Appellant's other contentions are without merit

(Tr. 27, 29–40; MS Tr. 5, 7, 11, 13, 16; MT 2 Tr. 1–10)

(A)

Appellant claims that he requested the trial court prior to trial to provide him with a transcript of the motion to suppress hearing and that this request was erroneously denied.[21] The Government finds nothing in the record of this case to show that appellant ever requested the transcript of the motion to suppress hearing or that the trial court ever denied such a request. Therefore, appellant's contention must fail. See *T.V.T. Corp.* v. *Basiliko,* 103 U.S. App. D.C. 181, 257 F. 2d 185 (1958); *Kelley* v. *Dunne,* 369 F. 2d 627 (1st Cir. 1966); *In re Chapman Coal Co.,* 196 F. 2d 779, 785 (7th Cir. 1952).[22]

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[20] See *Burdeau* v. *McDowell,* 256 U.S. 465 (1921) where private papers stolen by a private citizen and turned over to the Government were held admissible on the ground that no police misconduct existed which should be punished by means of the exclusionary rule. Likewise, in the instant case, there is no police misconduct which need be deterred or punished.

[21] Brief for Appellant, pp. 35–36.

[22] In addition, appellant has failed to show any prejudice.

(B)

Appellant contends [23] that the trial court abused its discretion in denying his *pro se* motions to terminate the services of his court-appointed attorney.[24] On August 12, 1966, Judge Gasch held a full hearing on appellant's *pro se* motion to terminate the services of his court-appointed counsel (MT 2 Tr. 1–10). At the hearing appellant's attorney represented to the court that he could effectively represent appellant if appellant would cooperate (MT 2 Tr. 9). Judge Gasch recognized the willingness of appellant's attorney to effectively represent appellant and denied appellant's motion with the admonition to appellant "to cooperate with your counsel" (MT 2 Tr. 10).

The trial judge has wide discretion in ruling on motions to terminate the services of court-appointed attorneys. *Brown* v. *United States*, 105 U.S. App. D.C. 77, 82, 84, 264 F. 2d 363, 368, 370 (*en banc*) (concurring and dissenting opinions), *cert. denied*, 360 U.S. 911 (1959); *Dearinger* v. *United States*, 344 F. 2d 309, 311–12 (9th Cir. 1965); *Juelich* v. *United States*, 342 F. 2d 29, 32 (5th Cir. 1965). Judge Gasch in ruling on appellant's motion made a reasoned decision that if appellant cooperated with his attorney, he would be effectively represented. Under these circumstances, the trial court did not abuse its discretion. *Murray* v. *United States*, No. 20921, D.C. Cir., *affirmed* by order October 3, 1967 (counsel suggested defendant plead guilty); *Cunningham* v. *United States*, No. 19648, D.C. Cir., *affirmed* by order June 23, 1967 (first degree murder case); *Brown* v. *United States*, 105 U.S. App. D.C. 77, 264 F. 2d 363 (*en banc*) (prevailing opinion), *cert. denied*, 360 U.S. 911 (1959) (counsel told defendant that he "didn't think he had a chance of beating the thing"); *United States* v. *Gutterman*, 147 F. 2d 540 (2d Cir. 1945) (L. Hand. A. Hand, JJ.). In addition, appellant has not made the necessary showing of prejudice. *Brown* v. *United States*, 105 U.S. App. D.C. 77, 81, 264 F. 2d 363, 367 (*en banc*) (prevailing opinion), *cert. denied*, 360 U.S.

[23] Brief for Appellant, p. 36.

[24] Appellant has not cited any cases to support his contention.

911 (1959); *United States* v. *McMann*, 263 F. 2d 940, 943–44 (2d Cir. 1959).[25]

[25] Appellant, speaking for himself, made many representations to Judge Gasch at the August 12, 1966 hearing which were either misleading or untrue.

(1) Appellant represented that his attorney did not appear in the Court of General Sessions on December 2, 1965 and February 18, 1966 to represent him on the vagrancy charge (MT 2 Tr. 4–5). Mr. Micheel, appellant's attorney in the instant case, was not appointed to represent appellant in the vagrancy case and this is reflected in the vagrancy information (D.C. 32783–65). This, of course, explains why Mr. Micheel did not appear in the Court of General Sessions to represent appellant on the vagrancy charge. In addition, there is nothing in the record to show that appellant wanted or requested Mr. Micheel to appear on his behalf in the Court of General Sessions on the vagrancy charge. Furthermore, the vagrancy charge was *nolle prossed* by the Corporation Counsel's Office on February 18, 1966 because appellant had been in jail for six months (MS Tr. 16).

(2) Appellant represented that his attorney did not appear in the United States District Court on December 10, 1965 to represent him at a motion for reduction of bond (MT 2 Tr. 4–5). On November 30, 1965, a letter from appellant in the nature of a motion to reduce bond was filed. Unfortunately, the Clerk's Office filed this letter-motion under Cr. No. 532–65 (*United States* v. *John L. Worthy*) rather than GJ 1510-65 (*United States* v. *John L. Worthy*) which became the instant case. Thus, when a hearing was held on this motion on December 10, 1965, appellant's attorney in Cr. No. 532–65 appeared rather than Mr. Micheel who was representing appellant in GJ 1510–65. As a result of the December 10, 1965 hearing, appellant withdrew his motion to reduce bond and was granted his oral motion for a mental examination to cover Cr. No. 532–65 and the instant case.

(3) Appellant represented that his attorney did not file enough motions (MT 2 Tr. 6). Appellant's attorney filed both a written motion for mental examination and a written motion to suppress. There is nothing in the record to indicate that other motions were necessary or appropriate. It is not "defense counsel's duty to 'make every motion in the book' in the hope that one may succeed," *Harried* v. *United States*, No. 20372, D.C. Cir., November 30, 1967, slip opinion p. 8.

(4) Appellant represented that his attorney did not obtain the police statement of facts (MT 2 Tr. 6). This document is a Jencks document and is not obtainable prior to trial. See 18 U.S.C. § 3500. The police statement of facts was made available to appellant and his attorney at trial (Tr. 38–40).

(5) Appellant complained that his attorney did not call Detective Jenkins to testify at the motion to suppress hearing (MT 2 Tr. 5). At trial appellant's attorney explained that he did not want to call Detective Jenkins as a defense witness since the defense would be bound by his testimony (Tr. 27). When Detective Jenkins did testify at trial, he completely corroborated the testimony of Detective Kuntz (Tr. 29–39).

(6) Appellant represented that his attorney had not consulted with him enough (MT 2 Tr. 6–7). Appellant's attorney represented to the court that he had conferred with appellant "on many occasions" (MT 2 Tr. 3).

(C)

Appellant contends[26] for the first time on appeal that he was denied his Sixth Amendment right to a speedy trial by reason of the eleven month delay between indictment and trial.[27] Briefly stated, the delay was due to five court continuances because the case could not be reached, one Government continuance because two Government witnesses were on vacation, one defense continuance due to a personal emergency of appellant's counsel and the adoption of Rule 87 of the Criminal Rules of the United States District Court for the District of Columbia.[28] Under these circumstances, it cannot be said that the delay was "arbitrary, purposeful, oppressive or vexatious." [29] Therefore, appellant was not denied his Sixth Amendment right to a speedy trial. *Ewell* v. *United States*, 383 U.S. 116 (1966) (no denial of speedy trial where delay was 19 months from indictment); *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 364 F. 2d 684 (1966) (no denial of speedy trial where delay was 10½ months from indictment to trial).

In addition, there is no showing of prejudice on this record. Appellant makes the mere assertion on appeal that a witness died during the delay.[30] However, appellant does not specify who the witness was, when the witness died, what the witness would have testified to or how the witness' testimony would have been helpful to him. Appellant's defense at trial was that he stole the 53 capsules of heroin that were found on his person and that he believed the capsules to contain only milk sugar because two of the capsules would not cook up for a shot. Appellant never contended at trial that there were any witnesses to his stealing the capsules or to his attempting to cook

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[26] Brief for Appellant, pp. 36–37.

[27] Appellant has not cited any cases to support his contention.

[28] Rule 87 of the Criminal Rules of the United States District Court for the District of Columbia became effective approximately 7½ months after appellant's indictment was presented and filed. Rule 87 changed the method of calendering cases from the "date certain" system to the "reserve-certified ready" system.

[29] *Smith* v. *United States*, 118 U.S. App. D.C. 38, 41, 331 F. 2d 784, 787 (1964) (*en banc*).

[30] Brief for Appellant, p. 37.

up the capsules. Therefore, the Government believes that appellant has failed to make a showing of prejudice.[31]

(D)

Appellant contends [32] that he was denied his Sixth Amendment right to effective assistance of counsel.[33] Although it is not clear, appellant seems to claim that his attorney prejudiced him by allowing his prior criminal record to be brought out at the motion to suppress hearing during cross-examination of Detective Kuntz. The truth of the matter is that appellant's prior criminal record was brought out at the beginning of the motion to suppress hearing during appellant's own testimony; appellant was the first witness at the motion to suppress hearing (MS Tr. 5, 7). Furthermore, Detective Kuntz testified on direct examination that he knew appellant's criminal record and the fact that appellant was a thief when he placed appellant under arrest (MS Tr. 11, 13). "The burden on the Appellant to establish his claim of ineffective assistance of counsel is heavy." [34] In the instant case, appellant has failed to show that his representation was so ineffective as to have deprived him of a fair trial, and therefore, he has not met his burden. *Harried* v. *United States*, No. 20372, D.C. Cir., November 30, 1967; *Bruce* v. *United States*, — U.S. App. D.C. —, 379 F. 2d 113 (1967); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F. 2d 787, *cert. denied*, 358 U.S. 850 (1958).

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[31] Appellant was incarcerated the eleven months from indictment to trial. However, two months after appellant was indicted in the instant case he was convicted in another case, Cr. No. 582–65, and committed to serve a 10-year sentence; no appeal bond was set in Cr. No. 532–65 and the conviction was affirmed on appeal.

[32] Brief for Appellant, p. 37.

[33] Appellant has not cited any cases to support his contention.

[34] *Harried* v. *United States*, No. 20372, D.C. Cir., November 30, 1967, slip opinion p. 6.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
NICHOLAS S. NUNZIO,
CARL S. RAUH,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1967

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,888

JOHN L. WORTHY,

Appellant,

v. Cr. No. 189-66

UNITED STATES OF AMERICA,

Appellee.

PETITION OF APPELLANT FOR REHEARING

1. Petitioner, appellant, John L. Worthy, by his Court-appointed counsel, Thomas M. Raysor, Esq., hereby files a Petition for Rehearing and suggestion for Rehearing en banc, pursuant to Rules 40 and 35 of Federal Rules of Appellate Procedure and Rule 14 of the Rules of this Court. On August 6, 1968, there was entered by this Court a decision which affirmed the conviction of appellant in the United States District Court for the Districtof Columbia by a split decision of two Judges in favor of affirmance and one dissenting. This petition is timely filed within the 14 day period allowed.

2. The reasons assigned in support of this Petition for Rehearing and suggestion for Rehearing en Banc are as follows:

This case involves a question of exceptional importance,

inasmuch as it involves possible violation of Constitutional rights and police procedures. More specifically, the case involved alleged violation of rights of appellant protected by the Fourth Amendment of the Constitution of the United States to be free from illegal search and seizures in a situation where appellant had been arrested on a basis of alleged probable cause under the vagrancy statute of the District of Columbia, D. C. Code Title 22-3302 et seq., and narcotics seized incident thereto, the vagrancy charge later being nolle-prossed with the indictment and trial proceeding with respect to the narcotics charges. Appellant was not charged under the narcotics vagrancy statute, D. C. Code Title 33-416(a) et seq., but under the general vagrancy statute, supra. The case involves the question of whether the search was reasonable under the Fourth Amendment. Was any search incident to arrest under an unconstitutional statute an unreasonable one? Isn't the general vagrancy statute of the District of Columbia so broad and vague as to be unconstitutional and if so isn't a search based upon such unconstitutional statute a violation of appellant's rights under the Fourth Amendment of the Constitution? Shouldn't the fruits of such a search incident to an arrest be excluded? Should the police be

permitted under the Constitution to obtain evidence of narcotics by making an arrest on a general vagrancy charge as the basis for searching for narcotics and then dropping the vagrancy charges and proceeding on the narcotics charge basis? Is it unreasonable and in violation of appellant's rights for a too extensive search of the person to be made in connection with a general vagrancy charge? In such situation, should only a frisk be permitted? These are some of the very important and Constitutional questions which are involved in this decision which should be decided by this Court en Banc because of their general importance and application to police procedures in the District of Columbia.

It also appears that the majority of the Court may have misapprehended which vagrancy statute was involved in this case. There are two completely different vagrancy statutes in the District of Columbia. One is the so-called "narcotics vagrancy statute", D. C. Code Title 33-416(a) et seq., which defines a vagrant to include "any person who is a narcotic drug user or who has been convicted of a narcotics offense" and who is subject to the other provisions of the statute. The second vagrancy statute is the general vagrancy statute which is known as D. C. Code 22-3302. Apparently, there was some

confusion in the majority opinion because it refers to both statutes and the reference to the general vagrancy statute is "Section 22-3302" whereas this is not a section of the narcotics vagrancy statute but a separate statute entirely. Title 22-3302 is a part of the Title of the Code dealing with criminal offenses. Title 33-416(a), the narcotics vagrancy statute, is a part of Title 33 - Food and Drugs. In this case, appellant was charged only under the general vagrancy statute. The narcotics vagrancy statute has no application because he was not charged under this statute. The information filed in the Court of General Sessions clearly shows that the appellant was charged under the general vagrancy statute and not under the narcotics vagrancy statute. The test of probable cause is vastly different in both of these cases. Because of this apparent misapprehension of law, appellant respectfully requests that there be a rehearing.

Conclusion

For these reasons, appellant contends that a rehearing en Banc should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to Carl

S. Rauh, Assistant United States Attorney, by delivering a copy thereof to his office on this 16th day of August, 1968.

Thomas M. Rayson

Thomas M. Rayson, Esq.